2016 IL App (1st) 140572 -U

SIXTH DIVISION
DATE: August 12, 2016

Nos. 1-14-0572 and 1-14-1045
(CONSOLIDATED)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 05 CR 5895
	)	
JAMELL MURPHY,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of leave to file successive post-conviction petition was proper as it did not state a newly-discovered claim of actual innocence. The new evidence was not of such conclusive character as to probably change the outcome.

¶ 2 Following a jury trial, the defendant, Jamell Murphy, was convicted of first degree murder and armed robbery, and sentenced to consecutive prison terms of 50 and 8 years. We affirmed the judgment on direct appeal. *People v. Murphy*, No. 1-08-1705 (2010)(unpublished order under Supreme Court Rule 23). We also affirmed the 2011 summary dismissal of defendant's first post-conviction petition. *People v. Murphy,* No. 1-11-0738 (2012)(unpublished order under Supreme Court Rule 23). The defendant now appeals from a 2013 order denying

him leave to file a successive post-conviction petition. He contends that his proposed petition presents a colorable claim of actual innocence based on a codefendant's affidavit that the defendant was not present for or involved in the instant offenses. For the reasons stated below, we affirm.

¶ 3 The defendant and codefendants, Noah Wilson and Melvin Williams, were charged with first degree murder and armed robbery committed on June 22, 2004. The murder charges alleged that the defendant personally discharged a firearm causing the death of Darryl Floyd. The armed robbery charge alleged that the defendants knowingly took currency, jewelry, and guns from Floyd by force or threat of imminent use of force while the defendant was armed with a firearm. The defendants each received a jury trial, with the defendant and Wilson tried simultaneously. Williams was convicted of murder and armed robbery and sentenced to 50 years' imprisonment. *People v. Williams*, No. 1-07-2635 (2009)(unpublished order under Supreme Court Rule 23).

¶ 4 At the March 2008 trial, the evidence established that, after 11 p.m. on June 22, 2004, police officers responded to a report of a man shot at 7147 South Campbell Avenue in Chicago (the House). The officers found Floyd standing in the street waving to them. He was naked except for socks. He had an apparent gunshot wound to the left buttock, so an officer called for an ambulance. Before going to the hospital, Floyd identified himself and spoke briefly with a detective. In a bedroom of the House facing Campbell Avenue, there was a window broken from the inside and fresh blood on the bed. Codefendant Williams, Gregory Moss, Kathy Perry, Vanessa Davis, and Lisa Allen were at the House when the police arrived. The officers did not see the defendant or codefendant Wilson there. Floyd died on July 2, 2004, of an infection from the gunshot wound to the back of his left thigh. The autopsy also found abrasions to Floyd's right knee and lower leg.

¶ 5 Tamar Boswell testified that she lived next door to the House, which was owned by Moss. Williams and Davis, his wife or girlfriend, also lived in the House. On June 22, 2004, Williams and Moss asked Boswell to pick up a friend in her car. Boswell picked up Mercedes Wilkes and Floyd. (She did not know Floyd but described him as a bald, brown-skinned young man.) She was reluctant to allow Wilkes and Floyd into her car, as the situation "didn't have a good vibe" and "looked fishy to me," but Wilkes pleaded for a ride. Boswell brought them to the back door of the House, where Williams and Moss met them. Later that day, Boswell attended church from about 7 p.m. until after 10:30 p.m. She was parking in front of her home upon returning from church when she saw Floyd walking towards her. He was naked and exclaiming "Help me!" and that he had been shot. The police and an ambulance arrived a short time later. Boswell did not see the defendant that day.

¶ 6 Kathy Perry testified that, in 2004, she lived in the House with Allen, as Moss's tenants. Williams and Davis also lived there, as did Wilkes and a man Perry knew as Cisco. Perry knew Williams's nickname to be "Prince." On June 22, 2004, Perry saw Wilkes come to the House with Floyd, who Perry knew only as Darryl. Perry then overheard Wilkes, Williams, and Moss discussing "trying to open a safe." Wilkes and Floyd went to the basement of the House for several hours. Wilkes then brought Floyd to Perry's room, where Perry and Allen were waiting. In the room, Floyd, Perry, and Allen got "high" on cocaine paid for by Floyd. Allen promised Floyd "sexual favors," so he took off all his clothes except his socks. As part of Floyd undressing, Perry took two pistols from him. Perry and Allen did these acts because Williams had asked them to. Also because of her discussion with Williams, Perry expected that robbers would knock on the door and enter her room once Floyd was naked and unarmed. However, the door was kicked in and two young men entered. One was carrying a shotgun, and Perry did not

notice if the other was armed. Perry left the room once they entered, meeting Williams in the living room. She could still see into the bedroom. Floyd had been lying on the bed when the two men entered. He took money from his socks when he saw the men, and he was pleading that they not kill him. Perry heard two gunshots and saw Floyd leap out the window. The two men then left the bedroom, and Perry did not see them again. Perry and Allen left the House the next day. Perry did not tell the police about the robbery in her initial interviews, out of fear of being shot like Floyd. She gave a truthful account to police in October 2004, when she had moved to a new home unknown to Williams. At trial, Perry identified photographs of the bed with blood on it and the damaged window. The blood was not present, and the window was not damaged, before the two men entered the room. Perry did not identify anyone in the courtroom at trial as either man.

¶ 7 A police detective testified to interviewing Williams, Perry, Allen, Moss, and Davis at the House on the night of the shooting. None of them seemed to be "under the influence of anything" at that time. The detective later interviewed Wilkes, then re-interviewed Williams, Perry and others. He sought and arrested Williams based on his interview of Perry. Based on his October 2004 post-arrest interview of Williams, the detective sought codefendant Wilson and the defendant, Williams's nephew. The detective believed that Williams had been dishonest in his various interviews because his accounts of events changed each time.

¶ 8 The defendant was arrested on the early morning of January 28, 2005. He attempted to hide from the officers, though the arresting officer found no warrant against him. He did not seem to the arresting officer to be under the influence of drugs or alcohol. He was informed of his *Miranda* rights and was taken to the police station lockup at about 1 a.m. He was allowed to use the washroom and again informed of his *Miranda* rights before being interviewed at about

10:30 p.m. During the interview, he was provided cigarettes, sodas, and chips. He did not appear to be under the influence of drugs or alcohol, and he denied being so when asked. The defendant admitted to shooting Floyd in the course of a robbery arranged by Williams. The defendant's .380-caliber semi-automatic pistol was provided by Wilson, who received it from Williams. Wilson held an unloaded shotgun during the robbery. The robbery involved two women purporting to engage in "some sort of sexual activity" with Floyd in his bedroom so he would be naked when the defendant and Wilson arrived to take "money, guns, and jewelry" from Floyd's safe. The defendant shot Floyd once in the buttocks when he tried to flee, and Floyd jumped out the window. Williams arrived after the robbery and took the proceeds. The defendant said in the interview that he did not take anything from Floyd's bedroom and never received a share of the proceeds. The interview ended at about midnight. The defendant was interviewed again at about 2 a.m. on January 29, by an assistant State's Attorney (ASA), who first informed him of his *Miranda* rights. The defendant gave a similar inculpatory account in his second interview. Outside the presence of the police, the ASA asked the defendant if he had been well-treated by the police, and the defendant did not complain. At about 4 a.m., after waiting over an hour for a videographer, the defendant gave a videotaped statement.

¶ 9 In the videotaped statement, the defendant admitted that he and Wilson participated in a robbery at the House at the behest of Williams, his uncle. Wilson had a shotgun. Williams first told the defendant to rob a couple on the street who would be carrying a bag Williams expected to contain guns and ammunition. The defendant and Wilson committed a robbery on the street but the bag that they stole did not contain guns or ammunition. Williams then told the defendant of his robbery plan to lure Floyd to a room in the House with two women. Williams gave Wilson a .380-caliber semi-automatic pistol, which Wilson gave to the defendant. Wilson kept

the shotgun. On Williams's signal, the defendant and Wilson entered the room in question. Wilson swung the shotgun as a club, but Floyd grabbed it. The defendant pointed a gun at Floyd's head and told him to let go. The defendant then shot Floyd in the leg. Floyd leapt out of the window, and the defendant left the House.

¶ 10 The defendant testified that Williams is his mother's brother, but he knew Williams only since Williams "got out of jail" in 2002 or 2003. Williams was known as "Prince" because he was a "prince" or leader of a gang. On June 22, 2004, the defendant went to the House because Williams called him to discuss "a lick." The defendant explained that a lick could be a robbery, a lucrative drug sale, or other "easy money." The defendant went to the House with Wilson and brought cocaine to the House. At the House, he saw Williams, Davis, Moss, Cisco and some women he did not know. The defendant and Wilson sold the cocaine to Williams and Moss, and Williams consumed some of the cocaine. Williams then told the defendant to rob a particular couple on the street. The defendant and Wilson committed the robbery, taking a gym bag from the couple. Wilson had brought an unloaded shotgun to the House and carried it in the robbery. The defendant and Wilson returned to the House and reported to Williams. Williams became angry because the gym bag contained no valuables. As the defendant looked out a window of the House, he saw Cisco in front of the House robbing the same couple with a .380-caliber semi-automatic pistol. Cisco came back into the House after the robbery. The defendant told Williams that he and Wilson were going to leave before the police arrived to investigate the robberies. Williams told Wilson to leave the shotgun at the House, and he did so. Three days later, the defendant saw Williams with the .380-caliber pistol.

¶ 11 In October 2004, the defendant learned of Williams's arrest from relatives. On the early morning of January 28, 2005, the defendant was arrested. Before the arrest, the defendant had

been consuming marijuana cigarettes dipped in PCP. He hid from the police because he had an outstanding warrant for a cannabis offense. He was informed of his *Miranda* rights at the scene of the arrest. He learned at the police station that he was suspected of murder. After being processed and held in the lockup, the defendant was brought to an interview room. There, he was handcuffed to the wall, questioned at length by several detectives, and eventually gave a videotaped statement. When the defendant asked to make a phone call, a detective told him "not right now." The defendant wanted to call so his family would send an attorney, but he could not recall asking the police for an attorney. During his questioning, he used the washroom once and was not fed or provided cigarettes. When the detectives told him that he would be charged with murder if he did not cooperate, he cooperated by agreeing to the "scenario" of events presented by one of the detectives. Some of the details of his statement were provided by a detective, some were from the defendant's own second-hand knowledge, and some were the defendant's fabrications. After he gave his statement, he was provided food and cigarettes.

¶ 12 The parties stipulated to a lockup keeper's testimony: the defendant told him at about 3 a.m. on January 28, 2005, "that he was under the influence."

¶ 13 In rebuttal, a police detective testified that he did not provide the defendant with details of the Floyd robbery and shooting. The defendant did not tell detectives that he went to the House solely to sell cocaine to Williams. The defendant did mention a robbery that he and Wilson committed on the street near the House, but the police had no report of a robbery on that day in that area.

¶ 14 The jury found the defendant guilty of first degree murder and armed robbery. The court sentenced the defendant to consecutive prison terms of 50 and 8 years, including a 25-year firearm enhancement to murder.

¶ 15 On direct appeal, the defendant raised a challenge to the sufficiency of the evidence. He argued that the only evidence linking him to the shooting was his confession, which he disavowed at trial. We found that the defendant's confession was corroborated by evidence linking him to Floyd's shooting and that the jury could accept his statement over his trial testimony. *People v. Murphy*, No. 1-08-1705 (2010)(unpublished order under Supreme Court Rule 23).

¶ 16 In January 2011, the defendant filed a *pro se* post-conviction petition. He raised an *Apprendi* challenge to the firearm enhancement, arguing that the jury did not expressly find that he personally discharged a firearm. He also claimed reversible error from not being expressly charged with accountability. The circuit court summarily dismissed the petition in February 2011. The court found that the *Apprendi* claim was forfeited and the jury was duly instructed on the firearm enhancement. The court noted that accountability is not a separate offense that must be expressly charged. On appeal, we affirmed the summary dismissal. *People v. Murphy*, No. 1-11-0738 (2012)(unpublished order under Supreme Court Rule 23).

¶ 17 The defendant filed the instant *pro se* motion for leave to file a successive post-conviction petition in September 2013. He asserted that there was evidence that Floyd was not robbed: Floyd's statements to police in which he did not mention that he was robbed, and the police finding $2,227 of Floyd's money. The defendant also asserted that he had evidence that he was not involved in the shooting of Floyd: affidavits from himself and Williams. The defendant raised three claims: actual innocence, ineffective assistance of trial counsel for not presenting the evidence that Floyd was not robbed, and the State withholding of the evidence that Floyd was not robbed.

¶ 18 The defendant averred that, when police questioned him on January 28, 2005, he requested counsel and "denied any involvement" in the instant offenses. He was handcuffed to the wall all night and not fed. He was then told that he would be fed and could use the telephone once he admitted involvement in the shooting. He was told what to say and not to say in his statement. He "didn't fully understand what was going on due [to] my learning disability and mental illness," and "was also inebriated" and under the influence of "powerful narcotics" as he was questioned. He further averred that he was not involved in the instant offenses.

¶ 19 The defendant also presented codefendant Williams's affidavit that the defendant was not present for, and did not participate in, the shooting of Floyd. Williams averred in May 2013 that "on June 22, 2004, [the defendant] was not [i]nvolved in a shooting that took place at 7147 South Campbell, he was not present at the house at the time of the shooting."

¶ 20 On December 30, 2013, the circuit court denied the defendant leave to file a successive petition. The court found that the defendant had not shown cause for, or prejudice from, not raising the instant claims in his previous petition. Regarding Williams's affidavit, the court noted that he "was the person who implicated [the defendant] in the shooting" and cited Williams's statement used in his trial. The court also found that Williams's affidavit was not newly-discovered evidence of actual innocence because it was not of such conclusive character as to change the outcome. The court noted that the defendant gave a statement that included details consistent with evidence from the crime scene. This appeal followed.[1]

[1] The defendant took a timely appeal from the order of December 30, 2013. Notice of that order was sent on January 13, 2014, the defendant mailed his *pro se* notice of appeal on January 28, and the clerk of the court received it on February 4. This court also granted the defendant leave to file a late notice of appeal in April 2014. We have consolidated the appeals.

¶ 21 On appeal, the defendant contends that the circuit court erroneously denied him leave to file a successive post-conviction petition. He argues that he stated a colorable claim of actual innocence based on Williams's affidavit that the defendant was not present for or involved in the instant offenses.

¶ 22 Generally, a defendant may file only one post-conviction petition without leave of the court, which may be granted if the defendant shows an objective cause for not previously raising the claims of the proposed petition and prejudice from not raising them. 725 ILCS 5/122-1(f) (West 2012). Another basis for granting leave to file a successive petition is that the proposed petition raises a newly-discovered claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. Well-pled factual allegations in a post-conviction petition and supporting documentation must be taken as true unless positively rebutted by the record. *Id.*, ¶ 42. Our review of the denial of leave to file a successive petition is *de novo*. *Id.*, ¶ 31; *People v. Terry*, 2016 IL App (1st) 140555, ¶ 28.

¶ 23 In order to succeed on a claim of actual innocence, a defendant must present new, material, non-cumulative evidence that is so conclusive it would probably change the result on retrial. *Sanders*, ¶ 24. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard at trial. *Id.*, ¶¶ 24, 47; *People v. Coleman*, 2013 IL 113307, ¶ 96. A claim of actual innocence should be supported by new reliable evidence, such as exculpatory scientific or physical evidence or trustworthy eyewitness accounts. *People v. House*, 2015 IL App (1st) 110580, ¶ 41, citing *People v. Edwards*, 2012 IL 111711, ¶ 32. Claims of actual innocence rarely succeed because such reliable evidence is not presented in most cases. *Id.* A witness's recantation of his prior

testimony is generally viewed as inherently unreliable and does not merit a new trial except in extraordinary circumstances. *Sanders*, ¶ 33.

¶ 24 Conclusiveness is the most important element of an actual innocence claim. *Id*, ¶ 47. A defendant's new evidence must be so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt. *Id*. The new, material, and noncumulative evidence must place the trial evidence in a different light and undermine the court's confidence in the factual correctness of the guilty verdict. *Coleman*, ¶ 97. Actual innocence is a claim of vindication or exoneration, not insufficiency of the evidence or mere impeachment of witnesses. *Id*.; *House*, ¶¶ 41, 46.

¶ 25 Here, we find that the defendant has not stated a claim of actual innocence based on his new evidence because it is not of such conclusive character that it would probably change the result on retrial. A jury chose to credit the defendant's post-arrest statement over his trial testimony. We affirmed that judgment on direct appeal, noting that the defendant's statement was corroborated. Williams did not testify against the defendant, so his affidavit is not a recantation of evidence used to convict the defendant. Williams simply avers that the defendant was not involved in or present for the instant offenses. A similarly spartan affidavit did not impress this court in *House*, where affiant "Clark offered no explanation regarding why she changed her statement eight years after the crimes were committed. She simply stated without any explanation that she did not see [the] defendant kidnap or conspire to kidnap the victims." *House*, ¶ 42.

¶ 26 Williams is the defendant's uncle. Moreover, the defendant testified to participating in an armed robbery on the day in question (albeit not the Floyd robbery, he maintains) because Williams told him to. In short, Williams and the defendant are blood relatives and indisputable

partners in crime. Lastly, as the circuit court noted in denying leave, Williams gave a statement implicating the defendant as well as himself. That is borne out in the defendant's trial evidence: a detective testified that Williams's post-arrest interview prompted police interest in the defendant. In a new trial, Williams's prior accounts and his relationship with the defendant would be used to impeach his new exculpatory account. Under such circumstances, we find it unlikely that an exculpatory account from Williams would change the outcome in a retrial. Williams's affidavit did not undermine the circuit court's confidence in the factual correctness of the guilty verdicts, and it does not undermine ours. We therefore find no error in the court's denial of leave to file a successive post-conviction petition.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.